Supreme Court, U.S.
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No. 94-1257

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1994

In re: JAMES CONSTANT, *Petitioner*

On Petition for Extraordinary Writ to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent Advanced Micro-Devices, Inc.[1] disagrees with the petitioner's statement of the questions presented.

1. Whether issuance of the pre-filing review order was an appropriate exercise of the inherent power of the Court of Appeals.

2. Whether this Court should employ the unusual and extraordinary remedy of a writ issued pursuant to 28 U.S.C. § 1651(a) to grant further appellate review of issues previously considered and decided by the Court of Appeals and as to which this Court has previously denied review.

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[1] Advanced Micro-Devices, Inc. has no parent company and no subsidiary that is not wholly owned.

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In re: JAMES CONSTANT, *Petitioner*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STATUTES AND RULES

In addition to those statutes and rules cited by petitioners, the following statutes and rules are relevant in the case:

28 U.S.C. § 1651. Writs

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Rule 20.1 of the Rules of the Supreme Court of the United States:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651 (a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

I. Introduction

This proceeding is the latest in an incredible series of lawsuits, appeals and applications for review brought by petitioner James Constant. Most recently, by Order issued January 9, 1995, Mr. Constant's petition to this Court for certiorari in number 94-782 was denied. In 1993, petitioner sought review of another decision by the Ninth Circuit Court of Appeals, under docket 93-1518. That petition was denied by Order issued by this Court on May 16, 1994.

II. The Pre-Filing Review Order

The pre-filing review order which is the subject of this latest petition of Mr. Constant was issued by the Court of Appeals on October 20, 1994. The reasons for this order are readily apparent from the procedural history of Mr. Constant's vexatious litigation, which is set forth below. In petitioner's brief, he challenges not only the issuance of the order, but also the alleged failure of the Court of Appeals to decide petitioner's designated issues on the merits. *See* Petition 7. He also requests that this Court "determine the merits of the questions raised...." *Id.* 10. Thus, petitioner is again attempting to litigate issues previously considered and adjudged against him in earlier appeals.

III. Background Leading to Appeal to This Court in Cause Number 93-1518

Respondent Advanced Micro-Devices, along with Fujitsu Limited and Fujitsu Microelectronics, Inc. filed a brief in this Court in opposition to one of Mr. Constant's earlier petitions for writ of certiorari mentioned above, number 93-1518. That brief contains a comprehensive summary of petitioner's litigation activities which may be helpful to the Court, and for that purpose, it is set forth verbatim as follows.

"The history of this litigation began in January 1985 when petitioner filed an action in the United States District Court for the Central District of California against the corporate respondents and numerous other high-technology companies. *James Constant v. Advanced Micro-Devices, Inc., et al.,* Case No. 85-0262 SVW (C.D. Cal.) ("Patent Case I"). In that action, petitioner alleged infringement of two of petitioner's patents and also asserted other claims based upon the alleged unconstitutionality of 35 U.S.C. § 282, which authorizes federal courts to adjudicate the validity of patents. The District Court found § 282 to be constitutional and dismissed petitioner's claims unrelated to infringement. Then, in November 1987, the District Court (Judge Stephen V. Wilson presiding), after appointing and receiving recommendations from a special master, granted summary judgment that petitioner's patents at issue in the case were invalid. With this judgment, the District Court also awarded respondents their costs.

"Petitioner prosecuted two separate appeals of the District Court's judgment in Patent Case I to the United States Court of Appeals for the Federal Circuit. In each instance, the decisions of the District Court were affirmed. *See Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir. 1988); *Constant v. Advanced Micro-Devices, Inc.*, 862 F.2d 320 (Fed. Cir. 1988) (mem.). In its published opinion on the first of these appeals, the Federal Circuit warned petitioner about his already established practice of repeatedly raising previously litigated issues, as follows:

> "In the past the appellant has repeatedly attempted to reassert or revive claims and theories after they have been properly dismissed with prejudice by the district court. Appellant is hereby cautioned that if he persists by trying to raise again the same issues that have been finally decided by the district court or by this court, he could be sanctioned under Fed.R.Civ.P. 11, Fed.R.App.P. 38, and the inherent power of the courts to sanction."

Constant, 848 F.2d at 1572.

"In response to the Federal Circuit decisions, petitioner filed two petitions for writ of certiorari. Both petitions were denied. *See Constant v. Advanced Micro-Devices, Inc.*, 488 U.S. 892, 109 S. Ct. 228 (1988); *Constant v. Advanced Micro-Devices, Inc.*, 490 U.S. 1007, 109 S. Ct. 1643 (1989).

"Dissatisfied with the rulings in Patent Case I invalidating his patents, petitioner filed four new lawsuits in the Central District of California in October and November 1987 naming as defendants, among others, Judge Wilson, the special master appointed by Judge Wilson, and several of the defendants and their attorneys in Patent Case I. *See Constant v. Hillman,* Case No. 87-06592 R; *Constant v. Hoff*, Case No. 87-06766 R; *Constant v. Hitachi America, Ltd.*, Case No. 87-07046 R; *Constant v. Wilson*, Case No. 87-07315 R (collectively, "the Fraud Cases"). In these lawsuits, petitioner sought to collaterally attack the judgment in Patent Case I by claiming that it had been procured through a conspiracy among the defendants, their attorneys, and the federal courts to defraud him. Petitioner also sought to relitigate various issues before the district court in Patent Case I, including whether the proceedings of the patent action violated his right to due process, the constitutionality of 35 U.S.C. § 282, and the constitutionality of summary judgments.

"The Fraud Cases came before Chief Judge Manuel Real, who dismissed the complaints against Judge Wilson and the special master on the grounds of judicial immunity and granted summary judgment as to all other defendants on the basis that the Fraud Cases were an improper collateral attack on the rulings in Patent Case I and that petitioner failed to raise any issue of extrinsic fraud. Judge Real also sanctioned petitioner under Rule 11 for filing frivolous lawsuits and awarded defendants their costs and attorneys fees.

"Petitioner appealed Judge Real's decisions to the Federal Circuit (Case Nos. 88-1195 to 88-1198), which affirmed the judgments in all respects. *See Constant v. Wilson, Constant v. Hillman, Constant v. Hitachi America, Ltd., Constant v. Hoff*, 856 F.2d 202 (Fed. Cir. 1988) (mem.). The Federal Circuit also levied its own sanctions against petitioner for filing a frivolous appeal and awarded costs and attorneys fees to defendants....

[Quotations from opinion omitted]

"Petitioner subsequently filed a petition for writ of certiorari as to the Fraud Cases. This petition was denied. *See Constant v. Hitachi*, 493 U.S. 936, 110 S. Ct. 330 (1989).

"In 1988, petitioner filed another patent infringement case (involving a different patent than those in Patent Case I) against many of the same defendants as in the earlier patent case. *See Constant v. Advanced Micro-Devices, Inc.*, Case No. 88-00784 SVW (C.D. Cal.) ("Patent Case II"). This action was dismissed with prejudice by Judge Wilson for petitioner's continued refusal to comply with a court order to replead his complaint. In dismissing the complaint, Judge Wilson explained "[t]hat the Court is aware that dismissal with prejudice is a severe sanction to impose on a pro se litigant. However .... [h]is pro se status will not shield him from the consequences which any federal litigant must face if he or she insists on pursuing a course of conduct which shows a complete lack of respect for the federal courts." *Constant v. Advanced Micro-Devices, Inc.*, No.

88-00784 SVW unpublished order at 6-7 (C.D Cal. Oct. 31, 1988).

"Petitioner appealed the dismissal in Patent Case II to the Court of Appeals for the Federal Circuit, which affirmed the dismissal and again sanctioned petitioner for "filing and maintaining this completely unfounded and vexatious appeal." *Constant v. Advanced Micro-Devices, Inc.*, No. 89-1222 unpublished memorandum decision at 3 (Fed. Cir. April 11, 1989); *see Constant v. Advanced Micro-Devices, Inc.*, 873 F.2d 1451 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for writ of certiorari as to the dismissal was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 814, 110 S. Ct. 62 (1989).

"Also in 1988, respondent Advanced Micro Devices, Inc. (AMD) was forced by petitioner's claims in Patent Case II to file an action against petitioner in the Northern District of California for a declaratory judgment that certain other of petitioner's patents were invalid and not infringed by AMD. *See Advanced Micro-Devices, Inc. v. Constant* No. C 88 20101 (N.D. Cal.) (the "DJ Case"). The District Court found on summary judgment that one of petitioner's patents was invalid and that two others were not infringed. Petitioner appealed this judgment to the Federal Circuit, which affirmed. *See Advanced Micro-Devices, Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for a writ of certiorari was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 1057, 110 S. Ct. 868 (1990).

"Yet another action filed by petitioner in 1988, while petitioner's appeal in Patent Case I was pending, was a suit against the United States government in the United States Claims Court asserting that the United States Patent and Trademark Office had somehow breached "patent grant contracts" by issuing him patents that were found to be invalid. *See Constant v. United States*, No. 295-88 (C1. Ct. 1988) ("PTO Case"). The Claims Court dismissed this action, and petitioner appealed to the United States Court of Appeals for the Federal Circuit, which affirmed. *See Constant v. United States*, 861 F.2d 728 (Fed. Cir. 1988) (mem.), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789 (1989).

"Two years later, in August 1990, petitioner filed a motion for relief from the Claims Court's dismissal of his PTO Case. The Claims Court denied petitioner's motion, and petitioner appealed. The Federal Circuit once again affirmed the dismissal and once again sanctioned petitioner for filing a frivolous appeal, concluding that "[g]iven the number of actions he has filed and the frequency and persistence with which he continues to attempt to relitigate the same theories which have consistently and finally been rejected as meritless, the inescapable conclusion is that Mr. Constant 'is engaged in "recreational" litigation....'" *Constant v. United States*, 929 F.2d 654, 659 (Fed. Cir. 1991), *cert. denied*, 111 S. Ct. 2799 (1991). The Court of Appeals further directed the clerk of the court, "[i]n light of Constant's continuous abuse of the appellate process," "to accept for filing no motion, petition, pleading or other fileable paper from James Constant without an order of the court approving the filing." *Id.*

[The following passages, again quoting verbatim from the earlier brief, describe the specific litigation that gave rise to Mr. Constant's petition for certiorari in appeal number 93-1518.]

"In September 1989, petitioner filed a voluntary bankruptcy petition under Chapter 11 (later converted to Chapter 7) in the United States Bankruptcy Court for the Central District of California (*In re James Constant*, LA-89-19270 KL). Nearly all of the creditors' claims identified by petitioner in the bankruptcy petition consisted of claims, made by those defendants that petitioner had previously sued, for payment of the costs and sanctions imposed on him by the various district and appellate courts.

"In August 1991, in yet another attempt to relitigate his previously rejected claims of patent infringement, fraud, conspiracy, and other causes of action from Patent Cases I and II, the Fraud Cases, and the DJ Case, petitioner filed a complaint in the Bankruptcy Court against the defendants in the prior cases, their attorneys of record, and the bankruptcy trustee. This complaint began the present lawsuit from which petitioner now seeks certiorari. In this complaint, petitioner objected to the defendants' creditor claims on the grounds that they were based on "void judgments obtained through fraud" and rendered without subject matter jurisdiction or due process and sought to set aside all of the prior federal courts' "orders and judgments," to obtain money damages and injunctive relief for the purported injustice done to him in earlier actions, and to disbar the defendant attorneys.

[Petitioner's complaint was ultimately transferred to Chief Judge Real, who had heard the previous Fraud Cases. Petitioner then filed suit against Judge Real, accusing him of criminality and bias. Judge John G. Davies found no cause to disqualify Judge Real.]

"Respondent Fujitsu subsequently moved to dismiss petitioner's complaint with prejudice on the grounds that it was barred under the doctrine of res judicata and to enjoin petitioner from filing any further actions against the defendants without first obtaining the permission of the Court. This motion was granted by Judge Real, and the Court entered its orders of dismissal and injunction on March 12, 1992.

[Judge Real also granted a motion for sanctions and entered an order assigning certain patents to the United States Marshall for judicial sale.]

"Petitioner separately appealed to the United States Court of Appeals for the Ninth Circuit from the three district court final orders dismissing his complaint (Appeal No. 92-55465) [footnote omitted] awarding Rule 11 sanctions (Appeal No. 9256220), and assigning his patents and copyright (Appeal No. 92-56475). The Ninth Circuit affirmed the decisions of the District Court in their entirety, holding that petitioner's complaint was barred under the doctrine of res judicata, that the District Court did not abuse its discretion in awarding Rule 11 sanctions, and that the assignment of petitioner's patents and copyrights was proper. *See In re James Constant*, 12 F.3d 1105 (9th Cir. 1993) (mem.);

Petition App. A. Although declining to award sanctions against petitioner, the Ninth Circuit also noted in its unpublished memorandum decision that "Constant's claims are wholly without merit, and his appeals are especially frivolous in light of his long history of repeatedly litigating the same claims despite repeated warnings... that he would be sanctioned...." Petition App. A 10.

IV. Background Leading to Appeal to This Court in Cause Number 94-782

Mr. Constant's petition for certiorari in cause number 94-782 involved an adversary proceeding filed by the Chapter 7 Trustee in Mr. Constant's bankruptcy case to recover twenty-two patents fraudulently conveyed by debtor to his wife, Argery Constant. Debtor attempted to intervene in the adversary proceeding against his wife, but that motion was denied. The bankruptcy court, after trial, set aside the conveyances. Mrs. Constant appealed this judgment to the District Court, and Mr. Constant also appealed the denial of his motion to intervene. From the District Court's dismissal of both appeals and award of sanctions, the Constants appealed to the Ninth Circuit, which affirmed the actions of the District Court and imposed additional sanctions. The Constants then filed a petition for review which this Court denied by Order issued January 9, 1995.

ARGUMENT

I. The Ninth Circuit's Pre-Filing Review Order Is A Valid Exercise of its Inherent Power to Prevent Vexatious and Frivolous Appeals.

Respondent Advanced Micro-Devices, Inc. was not a party to the proceeding which led to issuance of the October 20, 1994 pre-filing review order of the Court of Appeals, and it has not yet been directly affected by, or benefitted from that order. Respondent will therefore limit its main argument in this brief to the second question presented. Respondent notes, however, that the pre-filing order appears to be a valid exercise by the Ninth Circuit of its power to prevent judicial proceedings before it from being used for abusive or vexatious purposes.

> A court has inherent power to determine whether its process is used for the purpose of vexation or fraud, instead of the single purpose for which it is intended--the adjudication of bona fide controversies. It is the duty of the court to prevent such abuse, and a dismissal of the cause is an appropriate way to discharge that duty.

Pueblo De Taos v. Archuleta, 64 F.2d 807, 813 (10th Cir. 1933). *See also*, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), *reh. den.* 501 U.S. 1269 (1991); *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319 (1927); *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888).

II. An Extraordinary Writ, A Drastic Remedy Intended For Use Only in Exceptional Cases, Is Clearly Inappropriate.

Petitioner, who has finally exhausted his avenues for appellate review in his persistent attempts to relitigate the same issues time and again, has now tried yet another approach.

This Court has expressly cautioned litigants that a writ issued under 28 U.S.C. § 1651(a) is a matter of the Court's "discretion, sparingly exercised", and that discretion is reserved for situations where "there are present exceptional circumstances". Supreme Court Rule 20.1. The rule limits this unusual remedy to litigants who cannot obtain "adequate relief...in any other form or from any other court." *Id.*

Petitioner Constant submits that the requirement of no other adequate remedy is satisfied here because "all appeals have been finally exhausted". Petition 5. It is precisely for that reason, *i.e.*, because all of Mr. Constant's arguments in his many appeals have been resolved against him, that this Court should dismiss the petition. In *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947), this Court stated,

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal

> counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

Accord, In re Sindram, 498 U.S. 177, 179 (1991), *reh. den.* 498 U.S. 1116 (1991) ("[T]he granting of an extraordinary writ is, in itself, extraordinary.")

Just as extraordinary writs of *mandamus* are not to be used as a substitute for appeal *before* a litigant has had an opportunity to appeal, they are not an appropriate substitute for an appeal *after* a decision has been rendered by lower court. *Ex parte Morgan*, 114 U.S. 174 (1885). In *Morgan*, the Court stated:

> If there is error in the judgment as rendered, it cannot be corrected by *mandamus* but resort must be had to a writ of error or an appeal.

114 U.S. at 175 (citations omitted). Here, petitioner has pursued every avenue of appeal, including seven petitions to this Court for writs of certiorari to the Federal Circuit and two petitions for writs of certiorari to the Ninth Circuit. Therefore, issuance of a writ could not be "in aid of the Court's appellate jurisdiction", as required by Rule 20.1, because the Court's appellate jurisdiction has already been sought, and his petitions for certiorari denied, in the exercise of that appellate jurisdiction.

Extraordinary writs may be appropriate in cases where a court has exceeded its jurisdiction or refused to exercise its jurisdiction, *see, e.g.*, *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943) and cases cited therein, or where appellate review may be defeated if a writ is denied, such as *State of Maryland v. Soper*, 270 U.S. 9, 29-30 (1926), but such a situation does not obtain here.

Nor can Mr. Constant establish any abuse of discretion by the Ninth Circuit. In *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953), this Court reviewed the action of the Fifth Circuit in granting a motion to sever and transfer a criminal case for improper venue in the context of a petition for extraordinary writ. In denying the writ, the Court observed that the ruling by the district judge was made "in the course of the exercise of the court's jurisdiction to decide issues properly brought before it." *Id.* at 382.

> The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in De Beers Consolidated Mines v. United States, 1945, 325 U.S. 212, 217, 65 S. Ct. 1130, 1133, 89 L. Ed. 1566. This is not such a case.

346 U.S. at 383. The Court also stated that the petitioner had not met the burden of showing that its right to issuance of the writ was "clear and indisputable". *Id.* at 384.

Accord, Kerr v. United States District Court for the Northern District of California, 426 U.S. 394, 402 (1976) ("...to be invoked only in extraordinary situations."); *Will v. United States*, 389 U.S. 90 (1967) ("drastic and extraordinary" remedy). In his petition for issuance of an extraordinary writ, Mr. Constant sets forth no "exceptional circumstances warranting the exercise of the Court's discretionary powers". Sup. Ct. R. 20.1.

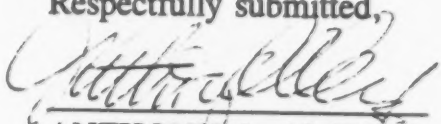
Petitioner and respondents have previously briefed and argued the issues claimed to justify an extraordinary writ many times, in many federal court proceedings. His arguments have been fully considered and resolved against him. Once again, and this time, finally and conclusively, this Court should deny relief to this vexatious and recreational litigant.

CONCLUSION

For the reasons set forth above, the Petition for Extraordinary Writ should be denied. Respondent also submits that an award of sanctions against petitioner, in the form of respondent's attorneys' fees and costs, would be appropriate under the circumstances.

Date: February 15, 1995

Respectfully submitted,



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